

United States District Court

For the Northern District of California

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10 CENTER FOR BIOLOGICAL DIVERSITY,
11 SURFRIDER FOUNDATION, AND PACIFIC
ENVIRONMENT,

No. C 12-01920 WHA

12 Plaintiffs,

13 v.
14 LISA JACKSON, in her official capacity as
15 Administrator of the United States Environmental
16 Protection Agency; the ENVIRONMENTAL
17 PROTECTION AGENCY; ROBERT J. PAPP,
in his official capacity as Commander of the
United States Coast Guard; and the UNITED
STATES COAST GUARD,

**ORDER GRANTING
DEFENDANTS'
MOTION TO DISMISS**

18 Defendants.
19 _____ /

20 **INTRODUCTION**

21 In this action brought under Section 7(a)(2) of the Endangered Species Act, defendants
22 move to dismiss claim one of the complaint pursuant to FRCP 12(b)(6). This order agrees that
23 the Act imposes a duty of consultation but holds that the duty to consult is adequately honored
24 under the regulations issued by Environmental Protection Agency. For the following reasons,
25 defendants' motion is **GRANTED**.

26 **STATEMENT**

27 The complaint in this action was filed by the Center for Biological Diversity, Surfrider
28 Foundation and Pacific Environment against Environmental Protection Agency its administrator

1 Lisa Jackson and United States Coast Guard and its commander Robert J. Papp. Claim one
2 names only Environmental Protection Agency as defendant. Defendants seek to dismiss only
3 claim one of the complaint. Plaintiffs allege in claim one EPA's listing of chemical dispersants
4 on the National Contingency Plan Product Schedule triggers a duty, on the part of EPA, to
5 consult pursuant to Section 7(a)(2) of the Endangered Species Act.

6 The coastal waters of California are host to endangered species and their critical habitats
7 including black abalone, loggerhead sea turtles and leatherback sea turtles. The 2010 Deepwater
8 Horizon oil spill in the Gulf of Mexico provided new information that dispersant use may harm
9 listed species or critical habitats. There is not yet long-term data available from Deepwater
10 Horizon but available information indicates dispersants are toxic to aquatic organisms.
11 Marine Fisheries Service has identified the use of dispersants may be detrimental to jellyfish.
12 Because jellyfish are a primary constituent element to the critical habitat of the leatherback sea
13 turtle; dispersant use would have a negative effect on the leatherback's critical habitat
14 (Compl. ¶ 84–98).

15 In the event of an oil spill, the federal government's duties are set forth in the Clean
16 Water Act. Within the executive branch, oil spill removal responsibility has been delegated to
17 EPA and Coast Guard. All removal must be conducted pursuant to the National Contingency
18 Plan. The Clean Water Act requires that the NCP shall include a product schedule. The product
19 schedule, at the time of the filing of the complaint, listed seventeen dispersants including Corexit
20 9500A and 9527A, both which were used in Deepwater Horizon. Currently, there are eighteen
21 dispersants listed (Opp. 18). EPA maintains and updates the product schedule. The Code of
22 Federal Regulations sets forth the process for maintaining the product schedule and the process
23 for adding products to it. 40 C.F.R. 300.905(a) and 300.920.

24 In addition to the NCP, the Clean Water Act requires the development of area and
25 regional contingency plans. Regional and area response teams address the "desirability of using
26 appropriate dispersants . . . listed on the NCP product schedule." 40 C.F.R. 300.910(a).
27 Generally, only products listed in a preauthorization plan are utilized in a spill situation. *Ibid.*
28

1 The regulations provide for limited exceptions if there is a threat to human life or the spill
2 occurred in an area not covered by a contingency plan. 40 C.F.R. 300.910(b)(c).

3 Claim one alleges EPA's listing of chemical dispersants on the product schedule triggers
4 a duty, on the part of EPA, to consult pursuant to Section 7(a)(2) of the Endangered Species Act.
5 Defendants seek to dismiss claim one as barred by the statute of limitations and for failure to
6 state claim pursuant to FRCP 12(b)(6).

7 ANALYSIS

8 Section 7(a)(2) of the Endangered Species Act provides that

9 [e]ach Federal agency shall, in consultation with and with the
10 assistance of the Secretary, insure that any action authorized,
11 funded, or carried out by such agency. . . is not likely to jeopardize
the continued existence of any endangered species or threatened
species or result in the destruction or adverse modification of
habitat of such species. . . .

13 The Clean Water Act directs the President to "prepare and publish a National
14 Contingency Plan for removal of oil and hazardous substances." 33 U.S.C. 1321(d)(1).
15 The NCP must "provide for efficient, coordinated, and effective action to minimize damage from
16 oil and hazardous substance discharges, including containment, dispersal, and removal of oil and
17 hazardous substances." 33 U.S.C. 1321(d)(2). Pursuant to Section 1321(d)(2)(G), the NCP shall
18 include a product schedule prepared in cooperation with the States, identifying:

- 19 (i) dispersants, other chemicals, and other spill mitigating devices
20 and substances, if any, that may be used in carrying out the Plan,
- 21 (ii) the waters in which such dispersants, other chemicals, and
other spill mitigating devices and substances may be used, and
- 22 (iii) the quantities of such dispersant, other chemicals, or other
spill mitigating device or substance which can be used safely in
such waters,

24 which schedule shall provide in the case of any dispersant,
25 chemical, spill mitigating device or substance, or waters not
26 specifically identified in such schedule that the President, or his
27 delegate, may, on a case-by-case basis, identify the dispersants,
other chemicals, and other spill mitigating devices and substances
which may be used, the waters in which they may be used, and the
quantities which can be used safely in such waters.

28

1 The President has delegated his authority to establish and implement the NCP to EPA, Coast
2 Guard and other federal agencies. The NCP regulations, promulgated by EPA, provide for
3 oil-spill contingency planning at the national, regional and area level.

4 Plaintiffs contend the mere listing of a dispersant to the product schedule triggers a
5 consultation requirement under the ESA. The order disagrees and holds that the duty to consult
6 arises only at the plan or implementation stage.

7 This issue turns on whether or not the NCP regulations properly implement the duty to
8 consult pursuant to Section 7 of the ESA. The regulations include two separate agency actions
9 where the duty to consult may arguably be triggered: (i) at the point a dispersant is listed to the
10 product schedule and (ii) at the point contingency planning occurs. Under the regulations,
11 however, the duty to consult is specified to occur at the contingency planning stage and not the
12 listing stage. As illustrated by 40 C.F.R. 300.210(c)(4)(i),

13 Area Committees shall incorporate into each ACP a detailed annex
14 containing a Fish and Wildlife and Sensitive Environments Plan
15 that is consistent with the RCP and NCP. The annex shall be
16 prepared in consultation with the USFWS and NOAA and other
17 interested natural resource management agencies and parties. It
18 shall address fish and wildlife resources and their habitat, and shall
19 include other areas considered sensitive environments in a separate
20 section of the annex, based upon Area Committee
21 recommendations. The annex will provide the necessary
22 information and procedures to immediately and effectively respond
23 to discharges that may adversely affect fish and wildlife and their
24 habitat and sensitive environments, including provisions for a
25 response to a worst case discharge. Such information shall include
26 the identification of appropriate agencies and their responsibilities,
27 procedures to notify these agencies following a discharge or threat
28 of a discharge, protocols for obtaining required fish and wildlife
permits and other necessary permits, and provisions to ensure
compatibility of annex-related activities with removal operations.

22 In the situation where there is no applicable contingency plan the implementing
23 regulations still call for consultation. Pursuant to 40 C.F.R. 300.910(b), for spill situations not
24 addressed by preauthorization plans

25 the OSC, with the concurrence of the EPA representative to the
26 RRT and, as appropriate, the concurrence of the RRT
27 representative from states with jurisdiction over the navigable
28 waters threatened by the release or discharge, and in consultation
with the DOC and DOI natural resource trustees, when practicable,
may authorize the use of dispersants. . . provided that the products
are listed on the NCP Product Schedule.

1 Plaintiffs contend that, in addition to the consultations required by the regulation,
2 consultation must also be occur at the listing stage. This order disagrees. The regulatory
3 scheme properly implements Section 7 of the ESA because it provides for consultation before
4 any dispersant is actually used. *First*, as detailed above, it is unlikely that merely adding a
5 dispersant to the product schedule would result in environmental impact without any
6 consultation. *Second*, at the listing phase, dispersant use is not authorized because “the listing of
7 a product on the NCP Product Schedule does not constitute approval of the product.” 40 C.F.R.
8 300.920(e). *Third*, the regulatory scheme expressly provides for consultation at the planning
9 phase. Consultation need only be required once, not twice. The planning stage is the best point
10 to conduct consultation because it can be directed at the specific geographic waters involved and
11 tailored to benefit the species and habitats affected within those waters. Further, Chevron
12 deference is owed to the agency’s judgment in how to best implement the duty to consult.
13 *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837, 844 (1984).

14 The case law also supports this interpretation of the statute. Plaintiffs’ rely upon several
15 decisions within our circuit that involve land-management plans to establish the product
16 schedule, like land-management plans, trigger consultation even though the agency action is
17 indirect (Opp. 12). *See Citizens for Better Forestry v. U.S. Dep’t Agric.*, 481 F. Supp. 2d 1095
18 (N.D. Cal. 2007); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Lane Country*
19 *Audubon Soc’y v. Jamison*, 958 F.2d 290 (9th Cir. 1992). These decisions, however, all involved
20 management plans that set forth criteria for future agency action. Here, at issue is the mere
21 listing of a dispersant to a product schedule, which by itself, cannot lead to future use of the
22 product. The contingency plans are what authorize use. The regulations provide for
23 consultation prior to the use of a dispersant.

24 The Clean Water Act and implementing EPA regulations provide a framework for
25 consultation during the contingency planning phase and not at the listing phase. Plaintiffs’ claim
26 consultation is triggered as well at the listing phase is an incorrect interpretation of the Act.
27 Defendants motion to dismiss claim one pursuant to FRCP 12(b)(6) is **GRANTED**.

1 This order need not determine if claim one is barred by the statute of limitations because
2 based on statutory interpretation of the Endangered Species Act plaintiffs have failed to state a
3 claim pursuant to FRCP 12(b)(6) .

CONCLUSION

5 For the reasons stated, claim one is dismissed without leave to amend, any attempted
6 amendment being futile.

7 The Court hereby orders that defendants shall file and serve the administrative record(s)
8 by **OCTOBER 4, 2012**. The parties shall file a status report by **OCTOBER 19, 2012** indicating
9 whether they are in agreement that the record is complete or whether any party intends to
10 file a motion regarding the completeness of the record or the need for extra-record materials.
11 By **NOVEMBER 16, 2012**, plaintiffs will file a motion for summary judgment pursuant to Civil
12 Local Rule 7-2 and FRCP 56. Defendants will serve and file any opposition and counter-motion
13 within **28 CALENDAR DAYS** of service of plaintiffs' motion. Plaintiffs will serve and file their
14 combined opposition and reply within **FOURTEEN CALENDAR DAYS** after service of defendants'
15 opposition and counter-motion. Defendants shall file their reply (not to exceed ten pages)
16 within **FOURTEEN CALENDAR DAYS** of service of plaintiffs' combined opposition and reply.
17 If, however, the parties are unable to reach agreement regarding the sufficiency of the
18 administrative record, any motion regarding the completeness of the administrative record or
19 the need for extra-record materials shall be filed by **NOVEMBER 2, 2012**. If any such motions
20 are filed, the parties shall submit, within **FOURTEEN CALENDAR DAYS** after the Court's ruling
21 on the motions, a proposed briefing schedule for cross-motions for summary judgment.

IT IS SO ORDERED.

Dated: September 4, 2012.

Wm. Alsup